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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Docket No. 78-1437

CALLMAN GOTTESMAN and PAUL J. PEYSER,

Petitioners,

v.

GENERAL MOTORS CORPORATION and
E.I. DU PONT DE NEMOURS & COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT GENERAL MOTORS CORPORATION IN OPPOSITION

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Question Presented

Whether petitioners, stockholders of General Motors Corporation, who failed to establish that General Motors Corporation is entitled to any recovery of money damage or other relief, are nonetheless entitled to an award of legal fees and expenses from either General Motors or du Pont.

Statement

This derivative action was commenced in June, 1957, after this court held that E.I. du Pont de Nemours & Co. ("du Pont") had violated Section 7 of the Clayton Act by

its ownership of stock of General Motors Corporation ("GM").[1] Petitioners claimed that du Pont had used its stockholdings in GM to favor du Pont's interest as a supplier, to the detriment of GM, in violation of federal antitrust law and state law. Petitioners' claims with respect to automotive fabrics and finishes were dismissed after a trial held in the winter of 1966-1967. That dismissal was affirmed on appeal.[2] The remainder of petitioners' claims were dismissed with prejudice after they reported to the Court that they had no reasonable prospect of establishing them.

Although they had been completely unsuccessful in establishing any basis for legal redress, petitioners thereafter sought attorneys' fees in the amount of $1,000,000 and $345,000 expenses. Judge Metzner denied their application[3] on the ground that the American rule with regard to attorneys' fee awards completely foreclosed an award here, because there was no statutory provision for such fees and he found that no benefit had been conferred upon GM.[4]

On appeal, the Second Circuit affirmed Judge Metzner's decision.[5] The Second Circuit had no difficulty in agreeing that petitioners had conferred no benefit upon GM[6] and

[1] *United States* v. *duPont & Co.*, 353 U.S. 586 (1957).

[2] *Gottesman* v. *General Motors Corp.*, 436 F.2d 1205 (2d Cir.), Cert. denied 403 U.S. 911 (1971).

[3] A copy of Judge Metzner's opinion is contained in the appendix to the petition at pages A12-A18.

[4] Petition P. A15. Judge Metzner was fully familiar with every aspect of this litigation, as it had been assigned to him for all purposes from October 1, 1959 to the time of his decision denying petitioners' fee application.

[5] A copy of the transcript of the panel's oral decision is contained in the appendix to the petition at pages A9-A11.

[6] Petition, p. A11.

that no fee award was warranted. In fact, the Circuit court announced its decision from the bench as is the custom "when the rule of law and its applicability to the facts of the case are clear."[7] The Court stated that it had considered the briefs and the authorities, *both state and federal,* relied on by the petitioners in their appeal.[8] Petitioners' petition for a rehearing, en banc was denied. Petitioners now seek a writ of certiorari to review those decisions of the Second Circuit.

Reasons for Denying the Writ

Under both state and federal law the rule is well-settled with regard to the award of attorneys' fees to unsuccessful litigants, such as petitioners here, in whatever capacity they purport to have acted. Its application to this case is clear—it absolutely forecloses any award of fees or expenses. Accordingly, their contention that the decisions below were in error and in conflict with prior decisions of this court is plainly wrong.

1. The Decisions Below Are Consistent With *Erie Railroad* v. *Tompkins.*

Petitioners contend that their petition presents an important question for review because the decisions below challenge the continued vitality of this Court's decision in *Erie Railroad* v. *Tompkins.*[9] They are wrong. Nothing in the decisions below is inconsistent with that decision. Under *Erie*, it is the obligation of a federal court, when considering matters which are governed by state substantive law, to reach the same result as would the courts of the

[7] Petition, p. A10.

[8] Petition, p. A11.

[9] 304 U.S. 64 (1938).

state involved (in this case Delaware), rather than applying a separate federal rule.

The petitioners have not shown that the result reached by the courts below differs in any respect from the result which would have been reached by a Delaware court. On the contrary, the authorities which the plaintiffs themselves have cited demonstrate how closely the Delaware courts adhere to the American rule. The leading Delaware authority on this issue is *Chrysler Corporation* v. *Dann*,[10] as may be seen from the petitioners own brief.[11] In *Dann* there was benefit to Chrysler Corporation as a result of the litigation—modification of the corporation's Incentive Compensation Plan—and the Supreme Court upheld an award of attorneys' fees based thereon. The court said that the Delaware rule regarding the award of attorneys' fees in derivative actions "requires that not only must the actions confer some benefit upon the corporation, but, also, that the action, when filed, was meritorious and had a causal connection to the conferred benefit." [12] Thus, contrary to petitioners' contention,[13] Delaware law follows the American rule and does not allow attorneys' fees merely because an action, when commenced, is not subject to dismissal on motion. Success in conferring some benefit by litigation is the prerequisite to a fee award under Delaware law.

In both *Iroquois Corp.* v. *Lewis*,[14] and *Saks* v. *Gamble*,[15] relied on by petitioners, there were benefits to the respective corporations. In each case the benefit consisted of the disclosure of matters which had been wrongfully concealed —in *Saks*, from the stockholders and in *Iroquois*, from nondefendant members of the Iroquois Corporation Board of Directors. Nothing in either of these decisions suggests that Delaware courts depart in any respect from the American rule, as set forth by this Court in *Alyeska Pipeline Co.* v. *Wilderness Society*[16] or that Delaware courts would allow any attorneys' fees to an unsuccessful, derivative plaintiff, who has conferred no benefit, merely because he may not have commenced the action frivolously. And in this case, both Judge Metzner and the Second Circuit have expressly found that there was no benefit conferred upon GM by this litigation.

[10] 223 A.2d 384 (Sup. Ct. 1966).

[11] See petition, p. 5, quoting from *Lewis* v. *Scotten-Dillon*, 306 A.2d 55 (Del. Ch. 1973).

[12] 223 A.2d at 387.

[13] Petition, pp. 5-9.

[14] 318 A.2d 134 (Sup. Ct. Del. 1974).

[15] 38 Del. Ch. 504; 154 A.2d 767 (1958).

2. The Decisions Below Are Consistent With *Mills* v. *Electric Auto-Lite Co.*

Petitioners also contend that the decisions below vitiate the force of this Court's decision in *Mills* v. *Electric Auto-Lite Co.*[17] Once again they are wrong. This Court in *Mills* upheld an award of attorneys' fees to derivative plaintiffs who had obtained partial summary judgment on the issue of liability, by establishing that approval of a merger between Electric Auto-Lite and another corporation had been obtained by use of a proxy statement containing material false statements. The revelation to the stockholders of Electric Auto-Lite of the manner in which they had been deceived was held to be a benefit to them, and this Court, in *Mills*, did no more than impose the cost of providing that

[16] 421 U.S. 240 (1975). Petitioners have urged that by relying on *Alyeska*, Judge Metzner has ignored state law and, thus, *Erie*. In fact, *Alyeska* restated as a matter of federal law what had long been the rule under the law of the several states, including Delaware. Petitioners' contention (Petition pp. 17-19) that the decisions below were somehow inconsistent with *Alyeska* does not deserve serious consideration.

[17] 396 U.S. 375 (1970).

benefit on the stockholders generally by causing the corporation to pay the attorneys' fees.

Here there has been no benefit to the stockholders of GM. This litigation has not revealed to them the existence of any violation of law or equity or of any matter which had been concealed from them. Any violation which had occurred by virtue of du Pont's stockholdings in GM was brought to light by the efforts of the Justice Department in *United States* v. *du Pont*,[18] before the commencement of this action.

Petitioners' efforts have been directed towards proving that General Motors has been damaged either as a result of that violation or through breach by duPont of an alleged fiduciary duty imposed by state law. In these efforts petitioners have failed completely.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[18] 353 U.S. 586 (1957).